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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2847 OF 2004

Chintaman Sukhdeo Kaklij and Ors. ... Petitioners

Vs.

Shivaji Bhausaheb Gadhe & Ors. ... Respondents

Mr. R.M. Haridas with Mr. P.N. Joshi for the petitioners.

Mr. S.S. Kulkarni for respondent 1.

CORAM: ABHAY S. OKA, J.

DATED: 8TH DECEMBER, 2004.

P.C.:-

1. Heard Mr. Haridas, the learned counsel appearing for the petitioners and Mr. Kulkarni, the learned counsel appearing for respondent no.1.

2. The order impugned in this petition is passed on an application (Ex-24) made by the petitioners. The application (Ex-24) was filed by the petitioners for setting aside 'No written statement order' and for taking their written statement on record. By the impugned order, the said application has been rejected by applying the provisions of Rule 1 of Order VIII of the Code of Civil Procedure, 1908 (as amended w.e.f. 1/7/2002). The learned trial judge held that in view of the mandate of the amended provision, he was not empowered to take the written statement on record after a period of 90 days

from the date on which the petitioners appeared before the trial court.

3. By the judgment and order dated 12th and 13/8/2004 of the Division Bench of this court passed in the very petition, it has been held that -

> "33. In view of the foregoing discussion we hold that rules 9 and 10 of Order 8 of CPC give discretion to the trial court to allow the defendant to file written statement even after the expiry of a period of 90 days as contemplated by Order 8 rule 1. We hasten to add that this does not mean that the order of extending time to file written statement can be granted casually, and unmindful of provisions that extension would not exceed 90 days. The provisions of Order 8 rule 1 always be kept in mind while passing order extending time for filing written statement to the suit and ordinarily such extension shall not be granted except in exceptional and special circumstances."

4. Mr. Haridas, the learned counsel appearing for the petitioners submitted that the written statement could not be filed within time as the petitioners' advocate Mr. Kulkarni suffered a heart attack and he was advised rest.

He submitted that considering the ground given in the application, the trial court could have exercised discretion in favour of the petitioners.

5. Mr. Kulkarni, the learned counsel appearing for respondent no.1 has vehemently opposed the petition. He submitted that in view of the law laid down by the Division Bench of this court, the application will have to be reconsidered by the trial court. He submitted that the Division Bench held that the order of extending time to file written statement cannot be passed casually and unmindful of the provision that extension would not exceed 90 days. He pointed out that the Division Bench held that ordinarily such extension shall not be granted except in exceptional and special circumstances.

6. I have considered the rival submissions. If the ground given in the application of the petitioners is that their advocate suffered a heart attack and was advised rest as a result of which the written statement could not be filed within the time prescribed by law, in my view, the extension of time for filing written statement deserves to be granted. If the petitioners had engaged services of an advocate and if unfortunately he suffered a heart attack, in my view, this is a special circumstance, which requires that extension of time for filing written statement should be granted. In the circumstances, the impugned order deserves to be quashed and set aside. Mr. Haridas, the learned counsel for the

petitioners submitted that the written statement has been already tendered along with the application. Hence, I pass the following order.

O R D E R

(i) The impugned order dated 3/1/2004 is quashed and set aside. The trial court is directed to take on record the written statement of the petitioners, which is tendered along with the application (Ex-24).

(ii) The petitioners are directed to pay the costs of Rs.1,500/- to respondent no.1 within a period of four weeks from today. If the amount of costs is not accepted by respondent no.1, liberty to the petitioners to deposit the said amount in the trial court.

(iii) Rule is made absolute in the above terms.

(iv) All concerned to act on ordinary copy of this order duly authenticated by the Sheristedar of this court.

(ABHAY S. OKA, J.)